Supreme Court, U.S.
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No. 96-323

In The

Supreme Court of the United States

October Term, 1996

K.R., an infant by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.,

Petitioners,

v.

Anderson Community School Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

Whether 20 U.S.C. Secs. 1400 et seq. (IDEA) requires Anderson Community School Corporation to provide K.R., a child with disabilities as defined in IDEA, with an instructional assistant on the site of a private parochial school where K.R.'s parents have voluntarily chosen to enroll her when K.R. is virtually wheelchair bound and the private parochial school is not handicapped accessible.

Petitioners raise a second issue contending that Anderson Community School's conduct violates the neutrality principle under the First Amendment. Respondent *objects* to the presentation of this issue as it is raised for the first time in Petitioners' Petition now before this Court.

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JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on April 12, 1996. The same Court's order denying Rehearing was entered on May 28, 1996. The jurisdiction of this Court is based on 28 U.S.C. Sec. 1254. The District Court jurisdiction was based on 20 U.S.C. Sec. 1415 (e) and 28 U.S.C. Sec. 1331.

STATUTORY AND REGULATORY PROVISIONS

The relevant federal statutes in this cause are 20 U.S.C. Sec. 1400 et seq., Individuals with Disabilities Education Act (IDEA). Federal regulations involved include 34 C.F.R. Sec. 300-403, 450-460, 506-511, 552; 34 C.F.R. Secs. 650-663. Indiana Statute, IC 20-1-6-4.

STATEMENT OF THE CASE

Respondent will follow generally the format adopted by Petitioner.

A. Statutory and Regulatory Scheme: Part B of IDEA provides for federal grants to be made through the state (SEA) to local education agencies (LEA) to assist in funding educational services for students with disabilities. As required by 20 U.S.C. Sec. 1412, Indiana has agreed to accept the provisions of IDEA. I.C. 20-1-6-4. Regulations have been adopted pursuant to 20 U.S.C. Sec. 1417.

A state which accepts the benefits of IDEA must have in effect a policy which assures all children with disabilities the right to a free appropriate public education (FAPE) and a plan assuring such an education is available. 20 U.S.C. Sec. 1412(1) and (2)(B). Each child identified as being disabled as defined by IDEA and regulations must be provided an individual education plan (IEP) that identifies the special education and related services necessary to meet the child's needs and must offer to provide those services at public expense. 20 U.S.C. Secs. 1412 (4), 1414 (a)(5).

The LEA must place a disabled child in a private school at public expense if it is unable to provide the services in a public school. 20 U.S.C. Sec. 1413 (a)(4)(B). Where parents voluntarily place their child in a private school, the state plan must have policies and procedures which assure

> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services . . .

20 U.S.C. Sec. 1413 (a)(4). If the parents voluntarily place their child in a private school "the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Secs. 300.450-300.452." 34 C.F.R. Sec. 300.403.

34 C.F.R. Sec. 300.451 requires the LEA to meet the requirements of 34 C.F.R. Secs. 76.651-76.662. Under these regulations the LEA "shall provide students enrolled in private schools with a genuine opportunity for equitable participation and do so in a manner consistent with the number of eligible private school students and their needs." 34 C.F.R. Sec. 76.651 (a)(1) & (2). The LEA must consult with students' representatives regarding which children will receive benefits, what benefits they will receive, how the children's needs will be identified, and how the benefits will be provided. 34 C.F.R. Sec. 76.652 (a). The program benefits the LEA provides for private school students must be comparable in quality, scope, and opportunity for participation to those it provides public school students. 34 C.F.R. Sec. 76.654 (a).

Respondent adopts the Seventh Circuit's statement of the facts found on pp. 2-3 of its decision and which read as follows:

> It is not disputed that K.R. is a child with disabilities who is eligible under the IDEA for special educational and related services. K.R. was a six-year-old kindergarten student at the time this dispute arose. She suffers from myelomeningocele, spina bifida, and hydrocephalus with a shunt, which create difficulties with expressive language, motor skills, and mobility, requiring her to use a wheelchair. She thus needs assistance with positioning for activities, reaching and grasping, self-help skills, motor movements, mobility, and expression. Implementation of her IEP (determined in conformity with the IDEA) requires, among other necessary related services, a full-time instructional assistant.

K.R. received services from community agencies prior to attending public school at Anderson Community Schools. At age three, K.R. was enrolled in the pre-school program at the public school where she received various services related to her disabilities. In the spring and summer of 1993, case conference meetings were held to work out K.R.'s IEP for the 1993-94 school year in anticipation of her continued attendance at public school. The IEP provided for placement in a kindergarten class with related services for speech therapy, occupational therapy, transportation, and a full-time instructional assistant. During the conference, K.R.'s parents asked whether K.R. would receive all of the services if she attended St. Mary's School, a private parochial school. The public school told K.R.'s parents that it would not provide an instructional assistant if she attended private school. Nonetheless, K.R.'s parents voluntarily enrolled her at St. Mary's for kindergarten. During K.R.'s attendance at St. Mary's the public school has provided K.R. with speech therapy, occupational therapy, and physical therapy at a public school site, as well as transportation to that site. Since the local system determined that it would not provide K.R. with an instructional assistant on site at the private school, and since St. Mary's chose not to provide the service itself, K.R.'s mother attended St. Mary's with her to fulfill the duties of an instructional assistant prior to the District Court's decision.

K.R.'s parents requested a due process hearing, which was held on October 26, 1993. The hearing officer concluded that the public school is not obligated to provide an instructional assistant at the private school. The Indiana

> Board of Special Education Appeals upheld the decision on April 7, 1994. Having exhausted their administrative remedies, K.R. and her parents filed a complaint in the District Court. On May 25, 1995, the District Court issued a permanent injunction and declaratory judgment holding that the public school was required to provide a full-time instructional assistant at the private school. K.R. ex rel. *M.R. v. Anderson Community Sch. Corp.*, 887 F. Supp. 1217 (S.D. Ind. 1995). The District Court based its decision on a regulation that requires the special education services to private school students be "comparable" to the services provided to public school students.

In addition, Respondent would note that St. Mary's school is not wheelchair accessible. (Hearing officer's decision-finding of facts nos. 7 and 8 found at pp. A-46 to A-47 in the appendix to Petitioners' Petition). The school corporation has accessible facilities for wheelchair bound students.

At page 7 of their Petition, Petitioners state that the Anderson Community School Corporation "disagreed with the Circuit Court decision, . . . " This statement is incorrect. The school corporation disagreed with the District Court decision. The school corporation is in full agreement with the Circuit Court's decision.

The Seventh Circuit Court of Appeals overturned the District Court ruling on April 12, 1996. The Seventh Circuit held at page 11-12 of its decision (A-12, A-13 of Petitioners' appendix):

> We conclude that the IDEA and its regulations do not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students. Rather, public schools are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation. Here, Anderson Community School afforded K.R. a genuine opportunity for the services of an instructional assistant at a public school, and she declined. Further, the public school's provision of other related services demonstrates that it reasonably exercised its discretion rather than eschew its responsibility once K.R. chose to attend private school. The decision of the District Court is therefore reversed.

Petitioners filed a petition for rehearing which was denied on May 28, 1996.

SUMMARY OF ARGUMENT

1. Under IDEA and its accompanying regulations, the decision of the Seventh Circuit Court of Appeals was correct. Both the statute itself and the accompanying regulations when read as a whole, grant the school corporation the right to determine where related services for a voluntarily enrolled private school student are to be provided. The Circuit decision in this case is not in conflict with any decision of this Court. The Seventh Circuit decision may be in conflict with a decision from the 2nd Circuit but the case at bar is not the appropriate case to clarify that apparent conflict.

2. The second argument made by Petitioners is that Anderson Community School's conduct constitutes a violation of the neutrality principle under the establishment clause of the First Amendment.

Respondent objects to any consideration of this issue because this issue was not raised in the prior proceedings and is raised by Petitioners for the first time in its Petition now before this Court. In any case, the actions of the Anderson Community Schools do not constitute a violation of the First Amendment's neutrality requirement.

ARGUMENT

1. Petitioners first argue that the Seventh Circuit's decision conflicts with *Zobrest v. Catalina Foothills Schl. Dist.*, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993). That case dealt only with the constitutionality of providing a sign language interpreter at a parochial school. The Court specifically refused to address the statutory and regulatory arguments. See 113 S. Ct. at 2465-2466. The language from *Zobrest* cited by Petitioner at pp. 9-10 of its brief is in support of the proposition that providing a sign language interpreter on site at the parochial school is a neutral service and therefore not a violation of the Establishment Clause. In no way can the language cited from *Zobrest* be interpreted as holding that IDEA *mandates* providing an instructional assistant on site.

Petitioners argue that the Seventh Circuit's decision is not well founded because of its reliance on *Goodall v. Stafford County Schl. Bd.*, 930 F.2d 363 (4th Cir. 1991) which was decided before *Zobrest*. However, *Goodall* was

revisited by the 4th Circuit in 1995 wherein the Court stated:

> "[W]e note that in *Goodall* I, we held that the Individuals with Disabilities Education Act (IDEA) . . . did not dictate that Stafford County must provide or pay for the services requested by the Goodalls in Mathew's Christian School. 930 F.2d at 369. That portion of our opinion was not overruled by *Zobrest*, . . . and cannot be challenged in the instant appeal." *Goodall by Goodall v. Stafford County Schl. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995)

Petitioners argue that the Seventh Circuit decision eliminates any choice which the student and parents may have. This contention is simply not supported by the law or the facts in this case. First of all, K.R. was voluntarily placed at St. Mary's with full knowledge that the *public school district* would not provide the instructional assistant on site. It did not prevent K.R. from still choosing to attend the private school.

The important point of the Seventh Circuit's decision is that the statute does not create *individual* rights for students who are voluntarily placed in private schools. Neither the Seventh Circuit Court decision nor IDEA eliminate the opportunity for St. Mary's to provide an instructional assistant on site. The decision merely holds that Anderson Community Schools is not required to pay for the instructional assistant in that case.

20 U.S.C. Sec. 1413 (a)(4)(A) requires each state plan provide policies and procedures which assure:

> (A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services . . .

It is important to note that the quoted statute states that provision must be made for voluntarily placed private school students "by providing for such children special education *and* related services." (emphasis added) If Petitioners' position is to be accepted then both the special education itself as well as the related services would have to be provided at the private school site. However, the LEA is clearly *not* required to provide the special education itself at the private school site. As long as the handicapped child has available a free appropriate public education, the public agency is not required to pay for that child's education when the parents have voluntarily enrolled the student at a private school. 34 C.F.R. Sec. 300.403 (a). *Burlington School Committee v. Dept. of Education,* 105 S. Ct. 1996 (1985).

As noted by the Seventh Circuit, the Department of Education has consistently interpreted the regulations as granting public schools discretion in providing benefits to students voluntarily attending private school. The Court at pages 9 and 10 of its decision cites the following authorities:

> 45 Fed. Reg. 22570 (1980) (stating that public school need only offer a genuine opportunity for equitable participation, and that what constitutes "genuine opportunity" will "vary widely,

> depending on local circumstances"); 49 Fed. Reg. 48522 (1984) (interpreting statute as providing public schools "with the discretion to devise . . . the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children" – an interpretation that "has been consistently followed by the Department"); 16 Educ. For Handicapped L. Rep. 1398-1400 (1990) (response letter stating that whether or not public school needs to provide on-site services at private school depends on the specific facts of each case); 20 Individuals with Disabilities Educ. L. Rep. 1440 (1994) (agency memorandum stating that private school children do not have an individual entitlement to the full range of services offered public school children, but must only be afforded a genuine opportunity for equitable participation); 22 Individuals with Disabilities Educ. L. Rep. 369 (1994) (responses letter stating same).

The Seventh Circuit goes on to correctly note at page 10 of its opinion:

> An agency's interpretation of its own regulations is entitled to substantial deference, unless it is plainly erroneous or inconsistent with the regulations. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386. Based on our analysis of the regulations, we find nothing plainly erroneous in the DOE's interpretation nor is it inconsistent with the regulations. We therefore adopt its interpretation as an accurate understanding of the law.

If Petitioners' argument were accepted, then it would confer upon voluntarily enrolled private school students rights *superior* to public school students. The parent of a public school student cannot unilaterally place their handicapped child in the public school of their choice and then demand that the special education and related services be provided at that specific location. See *Wilson v. Marana Schl. Dist. No. 6 of Pima Cty.*, 735 F.2d 1178 (9th Cir. 1984); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir. 1988). If Petitioners' position were accepted then the parents could place their child in a private school and then demand that the services be provided at that location with absolutely no consideration for the needs of the public agency and with no discretion granted to the public agency. This was clearly not the intent of IDEA and its accompanying regulations.

Petitioners argue that the intent of Congress was inclusion of all handicapped children within its purview. They then argue that it was therefore intended to grant voluntarily placed students with the right to demand services on site. Respondent must respectfully disagree with this assertion. When the predecessor to IDEA was enacted there were many handicapped children who were not receiving any services at all. The intent of Congress was to encourage State agencies and local school districts to provide an *opportunity* for an appropriate public education for all handicapped students. The law speaks of a free and appropriate public education not a free and appropriate private education.

The law and regulations require that a portion of the funding provided under IDEA be spent on private school students. However, as the Seventh Circuit noted at page 4

of its decision, federal grants provide only about 8% of the funds needed to provide disabled students with special services. Only a proportionate amount of those federal monies must be spent on voluntarily placed private school students. The law does not mandate that state and local funds be expended on private school students.

Petitioners' reliance on 34 C.F.R. Sec. 76.654 (a) is also not well founded. To accept petitioners' argument would be to fly in the face of all the other statutory and regulatory provisions. As noted by the Seventh Circuit at page 8 of its opinion:

> Only Section 76.654(a), relied upon by the District Court, lends support to the notion that disabled students voluntarily attending private school must be treated the same as public school students. It states that the "program benefits that [an agency] provides for students enrolled in private schools must be comparable in quality, scope and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools." 34 C.F.R. Sec. 76.654(a). But read in light of the statutory scheme outlined above and the other regulations, which precisely track the statutory division of public and private school students, the only reasonable interpretation of Section 76.654(a) is that the comparability requirement is limited to the "program benefits that [an agency] provides." Sections 76.651 and 76.652 explicitly give the public school discretion over what benefits to provide; however, when benefits are provided, Section 76.654 requires that they be comparable to benefits for public school students. Section 76.654 is not by its terms a

> mandate that private school students shall receive full benefits.

Petitioners contend that *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2485 (1994) supports their position. This contention is incorrect. First, as Justice Scalia notes in his dissent:

> Unlike most of our Establishment Clause cases involving education, these cases involve no public funding, however slight or indirect, to private religious schools. They do not involve private schools at all. The school under scrutiny is a public school specifically designed to provide a public secular education to handicapped students." 114 S. Ct. at 2506.

Secondly, the quoted language is mere dictum. Thirdly, the quoted language speaks of "handicapped children" generally and in the plural, not each handicapped child individually. Respondent agrees that handicapped, private school children as a class have certain rights to some services under IDEA. However, *Kiryas Joel* does not hold that a voluntarily placed private school student has an individual right to services and the Seventh Circuit's decision is not in conflict with *Kiryas Joel.*

Petitioners next argue that the Court's decision changes the definition of "comparable benefits." They cite *Wheeler v. Barrera*, 417 U.S. 402, 94 S. Ct. 2274, 41 L. Ed. 2d 159 (1974) in support of their argument. *Wheeler* dealt with Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241a et seq. which has some regulations which are similar to IDEA. *Wheeler* does not support Petitioners' contentions. The Court in *Wheeler* stated:

> Inasmuch as comparable, and not identical services are required, the mere fact that public school children are provided on-the-premises Title I instruction does not necessarily create an obligation to make identical provision for private school children." 417 U.S. at 421-422.

The *Wheeler* Court recognizes the same need for flexibility and discretion as the Court herein recognizes under IDEA. Like IDEA, Title I creates no individual student rights to specific services.

In addition, there are important differences between Title I and IDEA. IDEA clearly distinguishes between public school students and voluntarily placed private school students while Title I regulations "draw no distinction between public and nonpublic school children." *Wheeler, supra,* 417 U.S. at 406 n. 2. Title I deals solely with a federally funded program and the allocation of those funds, while IDEA creates obligations for the public school while financing only eight percent of the cost of those obligations. Under IDEA, the *federal* funds may need to be expended on a comparable basis but not the ninety-two percent provided by state and local sources. *Wheeler* provides no support for Petitioners. To the contrary, it provides support for the Seventh Circuit's decision.

Respondent would concede that the Seventh Circuit decision in the case at bar would appear to be in conflict with the Second Circuit's decision in *Russman by Russman v. Bd. of Education of the Enlarged City School Dist. of Watervliet,* 85 F.3d 1050 (2nd Cir. 1996). However, the *Russman* Court still holds that local school districts have the right to deny on-site services where the economies of

scale in providing the services at one place exist. However, Respondent's assertion in this case that it would cost more for the instructional assistant was rejected by the District Court. See pp. A-35 and A-36 of Petitioners' appendix. It would appear that since the cost would be greater to Anderson Community Schools to offer the services at the private school than at the public school, the *Russman* Court would have also decided in favor of Respondent.

Another reason for not necessarily comparing the *Russman* case with the case at bar and which would also weigh against granting Certiorari is the fact that the placement at St. Mary's school is *not* an appropriate placement. Placement of K.R. at St. Mary's school does not constitute the least restrictive environment and therefore is not the appropriate placement. IDEA mandates a free appropriate public education. In addition, that education must be provided in the least restrictive environment (LRE). 20 U.S.C. 1412 (5)(B).

> In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. Sec. 300.552(d).

The evidence in this case clearly established that St. Mary's school is not barrier free. K.R. would have to be carried up and down steps in order to initially get to her classroom and in order to attend art, music, physical education, recess and Mass. Such a situation creates a safety hazard. It therefore, creates a "potential harmful effect" for K.R. The public school, on the other hand, can provide K.R. a free appropriate public education which is entirely barrier free. The notes to 34 C.F.R. Sec. 300.552

indicate that the regulations for Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. 794, are instructive in determining this issue. Section 504 provides that reasonable accommodation be made for disabled persons. In this case, a choice exists between placement in a school where a child with serious physical limitations may be placed in a school with numerous barriers to the student's movement in the school environment or one in which no such barriers exist. Clearly, the least restrictive environment for K.R. under the facts of this case is a placement in the public schools. The District Court rejected the Respondent's safety argument and never directly addressed Respondent's argument that St. Mary's did not constitute the least restrictive environment available to K.R. However, the State Hearing Officer found that a free appropriate education could better be provided in the public school than in the private school based on the barrier and safety issues. See Petitioners' appendix pp. A-43 through A-51. The Seventh Circuit did not have to address this issue since it reversed the District Court based solely on statutory and regulatory interpretation. However, the fact that St. Mary's is not barrier free and is therefore not the least restrictive environment forms another basis for denying Certiorari and also distinguishes this case from *Russman*.

2. Petitioners argue that the conduct of the Anderson Community School Corporation in denying K.R. an instructional assistant on-site at the private parochial school violates the neutrality principle of the establishment clause of the First Amendment.

Respondent objects to Petitioners raising this issue. Petitioners did not raise this issue in the State administrative proceedings, the District Court or the Circuit Court. They cannot now raise this issue for the first time in their Petition for Certiorari.

In any case, there is simply no basis for such an argument. If Anderson Community Schools were hostile to religion as alleged, it would not have provided the occupational therapy, physical therapy and speech therapy which it has provided to K.R. Anderson's decision not to provide an instructional assistant on-site was based in part on its belief that State and federal laws and regulations gave it the option as to where such services would be provided. Anderson's decision was also based on its belief that St. Mary's was unsafe for K.R., was not the least restrictive environment and was therefore not an appropriate placement. These reasons for rejecting an on-site instructional assistant would apply equally whether the private school were parochial, atheist or non-denominational. There is absolutely no evidence in the record to indicate that Anderson Community Schools are hostile toward religion. Petitioners are grasping at straws and this argument should be rejected out of hand.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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